IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 20, 2007

STATE OF TENNESSEE v. FRANKLIN DAVIS

Direct Appeal from the Circuit Court for Franklin County
No. 14822-A Thomas W. Graham, Judge

No. M2006-01602-CCA-R3-CD - Filed July 31, 2007

The defendant, Franklin Davis, was convicted by a Franklin County jury of six counts of vandalism, Class D and E felonies; one count of arson of personal property, a Class E felony; and one count of conspiracy to commit vandalism, a Class D felony. He was sentenced to an effective term of seven years imprisonment. On appeal, the defendant challenges the sufficiency of the convicting evidence and the sentences imposed by the trial court. Following our review of the record, the parties' briefs, and the applicable law, we affirm the defendant's convictions but modify the defendant's sentence for his conviction of arson of personal property. We affirm the defendant's sentences in all other regards.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed as Modified

J.C. McLIN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and THOMAS T. WOODALL, J., joined.

Robert S. Peters, Winchester, Tennessee, for the appellant, Franklin Davis.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; James Michael Taylor, District Attorney General; and William Copeland, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The Franklin County Grand Jury returned an eight-count indictment charging the defendant and his two sons with four counts of vandalism in the amount of $1,000 to $10,000, two counts of vandalism in the amount of $500 to $1,000, arson of personal property, and conspiracy to commit vandalism with the damage valued at $10,000 to $60,000. The defendant's case was severed from his co-defendants, and he proceeded to trial. At trial, Charles Edmonds, Director of Schools for the

Franklin County School System, testified that the defendant's wife, Mae Davis,[1] had a busing contract with the school system in March 2001, and the defendant drove one of the buses. Edmonds recalled that an incident occurred around March 15, 2001, when the defendant and Mae drove two of their buses with school children and chaperones to Chattanooga on a field trip. Instead of bringing the children back to school by 3:00 p.m., the defendant and Mae returned early leaving the children in Chattanooga without transportation. Edmonds suspended the defendant and Mae from driving their normal routes the next day and later canceled their contract.

Edmonds stated that the defendant was very upset that Mae lost her busing contract and became angrier over time. Edmonds noted that buses started turning up vandalized around the first week of April 2001. Edmonds recalled that he made some statements to Mae in reaction to the vandalism. These comments upset the defendant, and the defendant called Edmonds and said "he was going to kill me, and asked me to come over to his house and he's going to shoot me."

On cross-examination, Edmonds elaborated that Mae called him sometime after the vandalism. It was in response to this conversation that the defendant called Edmonds and threatened him. Edmonds admitted that he did not perceive the defendant's threat as an immediate threat. On re-direct examination, Edmonds stated that he had dealt with emotional and upset people before, but the defendant was the only one who had ever threatened to kill him.

David Dotson testified that in March and April 2001, he owned five or six school buses and had a busing contract with Franklin County Schools. David recalled that on April 3, 2001, he discovered large holes jabbed through the radiator of Bus 5 causing $2,000 damage. David noted that the bus was parked behind E-Z Stop. David stated that he had the radiator repaired, but it was jabbed again the next day causing another $2,000 damage. He described the damage as approximately nine holes, each the size of a fifty-cent piece. On April 5th, David discovered holes ripped in the radiator of Bus 30, a bus he rented from his cousin, causing $500 damage.

David stated that he also owned Bus 17A and it was operated by Howard Farris. On April 24th, he received an early morning call that Bus 17A had been set on fire and was burnt to the point that it did not look like a bus. David noted that the bus was parked at Howard Farris's home on AEDC Road when it was set on fire. David testified that some of the routes he took over were routes previously driven by the defendant. David recalled an incident at a Krystal Restaurant when he approached the defendant and asked him "why are you doing this," and the defendant replied "look what you done to me."

On cross-examination, David acknowledged that the defendant never admitted to being responsible for the vandalism of the buses. However, he recalled that "[e]very morning when that bus was tore up, [the defendant] would come driving real slow right by" the market where the buses

[1] Because many of the individuals involved in this case have the same last name, we utilize first names as needed.

were parked. David admitted that the road by where the buses were parked was a heavily traveled road.

Jason Seals, a volunteer fireman, testified that he responded to the burning bus call on April 24, 2001. He opined that the cause of the fire was arson because the rubber mat on the floor of the bus was burned all the way down the center but the rest of the mat was fine. Seals also noted that the back door of the bus was open. Don Ellis, another fireman, also opined that the cause of the bus fire was arson because it appeared that an accelerant had been poured on the rubber mat down the center of the bus. Ellis noted that the bus's fuel cap had four tapped holes in it as if something had been removed from the fuel cap, but he did not "know what took place there."

Barbara Ashley testified that in April 2001 she was the driver of Bus 20 for Franklin County Schools, and the bus was owned by Larry Bradford. Ashley recalled that the morning of April 4th, she was several miles into her route when the bus started overheating, and she had to call Bradford to finish the route with another bus. Ashley said that the bus had been parked at her house the previous night. Larry Bradford then testified that he discovered that the radiator on Bus 20 had been punctured or jabbed several times. Bradford said that a road hazard could not cause that kind of damage. Bradford estimated that the damage was roughly $700 for the parts, and he did the labor himself.

Claude Theodore Langley testified that in April 2001 he was the driver of Bus 1A on Route 52, a bus owned by Bill Sisk and his wife. Langley recounted that on April 18th he was on his way to the school to pick up the children when the bus started running hot. He tried to fill the radiator with water, but the water kept shooting out of the front of the radiator. Bill Sisk then testified that Langley brought him the bus, and he examined the radiator. Bill said that it looked like someone had taken a screwdriver or tire tool and tore the radiator all the way across causing approximately $900 damage. Bill stated that the night before the incident the bus had been parked "right off of Lynchburg Road at [his] mother's house."

James Davis, the defendant's son and an original co-defendant, testified as a very reluctant witness for the state.[2] James stated that he pled guilty to vandalism on April 28, 2004. He said that he vandalized the school bus because his brother, Ricky Davis, told him he would give him $100 to knock a hole in the radiator of the bus. According to James, Ricky asked him to do it because Ricky and the defendant were in some kind of trouble. James said that the defendant did not have any knowledge of the deal to vandalize the bus. James stated that he never had a conversation with the defendant on how easy it would be to tear up a radiator, and the defendant did not furnish him with a crow bar. James admitted that his only connection with school buses was through the defendant.

[2] Although he had already pled guilty and had been sentenced, James tried to assert his privilege against self-incrimination, which the trial court would not allow because the cases against him were over and there was no danger of further prosecution.

On cross-examination, James testified that Beverly Sisk was with Ricky when Ricky asked him to vandalize a bus parked behind E-Z Stop, and she knew what was going on and was part of it. According to James, the meeting with Ricky and Sisk took place sometime prior to April 2001. During that meeting, Ricky told James that he wanted a hole knocked in the radiator that night, which James did. James recalled that the next morning he went to collect the money from Ricky, and Sisk was the one who paid him. James stated that Ricky had spent a lot of his life in prison; he had just served an eighteen-year term. On re-direct examination, James stated that Sisk and Ricky got the money to pay him by selling "dope." On re-cross examination, James said that he knew they sold "dope" because he used to buy it from them.

Beverly Sisk testified that she was dating Ricky in March and April 2001, and she was present during a conversation between Ricky and the defendant. During this conversation, the two of them talked about vandalizing school buses. Sisk said that this conversation occurred at the trailer she and Ricky were living in on Old Decherd Road. According to Sisk, the defendant was angry because he was losing his bus route and wanted to vandalize some buses parked behind E-Z Stop. Sisk said the defendant offered to pay Ricky and told him to take a crow bar or tire tool and jab through the radiators because that would cost a lot of money to repair. She recalled the defendant saying that he wanted to "cost [the Dotsons] a lot of money." She stated that she saw the defendant give Ricky some money although she did not know how much, but she recalled that one time Ricky had $100 after the defendant left. She also stated that the defendant brought Ricky a long crow bar and two big plastic jugs of what appeared to be gasoline. Sisk said that she did not hear the defendant explain to Ricky how to burn a bus, but Ricky told her at a later time about how the defendant told him to do it.

Sisk testified that she heard James and Ricky talking about the defendant's offering them money, but she never heard the defendant offer James money directly. She remembered a time when she and Ricky were at the defendant's house, and the defendant and Ricky went off to a garage with buses all over the yard. She said that she was not involved in the vandalism of any of the buses. Sisk noted that at a later time, she wore a recorder to get statements from Ricky concerning the vandalism offenses, and at no time in those transcripts did Ricky say "you were there, you ought to know" or make any reference to her being involved. Sisk said that she never paid James any money to vandalize a bus.

On cross-examination, Sisk admitted that after Ricky got out of prison, he never spent any time with the defendant because the defendant did not want to have anything to do with him. She recalled that one time she went with Ricky to borrow $10 from the defendant, and the defendant would not give the money to Ricky. She admitted that police wired her and had her tape a conversation with Ricky in August 2002, which was after she and Ricky had ended their relationship. Sisk acknowledged that on that tape she said she still loved Ricky. She said that the taped conversation took place at Hill Haven Trailer Park. She did not recall Ricky telling her he did not vandalize anything for the defendant.

Sisk stated that she knew Ricky burned a bus and knew "some stuff with a crow bar, some radiators." She denied driving Ricky to burn the school bus and said if Ricky said that, he was lying. Sisk testified that Ricky told her he burned the bus after he did it, but she said she really did not believe that it happened until she saw it in the newspaper. She said she did not tell the police that Ricky had admitted to burning the bus because Ricky told her that the defendant said to keep her mouth shut. She gave an otherwise full statement to police shortly after the incident. She again testified that the defendant brought Ricky a crow bar, but she admitted that she did not know what happened to it. Sisk recalled that Ricky must have driven her car when he went to set the bus on fire because he did not have a car. When asked if she had any knowledge of whether the defendant was involved in burning the school bus, Sisk stated "[the defendant and Ricky] were standing on the porch talking about" the defendant "paying Rick to burn the school bus," and "[the defendant] brought two big five gallon things of gasoline for him to do it with." Sisk said that although she heard the conversation between the defendant and Ricky, she did not "think [Ricky] would be stupid enough to do it." She denied selling marijuana or having any drug dealings with James Davis. She admitted that the transcript of her recorded conversation with Ricky in August 2002 showed that Ricky said he did not vandalize anything for the defendant.

On re-direct examination, Sisk said that she was shocked when the defendant showed up at her home to talk to Ricky because the defendant and Ricky hated each other. She stated that this visit occurred soon after the defendant was fired from driving the bus. Sisk looked at the transcript from the wired conversation in which she asked Ricky if $100 was worth burning the bus when "he don't give a sh[]t about you," and said that "he" was the defendant. She explained that she decided to wear a wire to get information from Ricky a year after she initially talked to police because her grandchildren had started riding a bus.

Regina Davis, Ricky Davis's wife, testified that she overheard the defendant talking to Mae about destroying the school buses and having Ricky burn a bus for him. Regina also heard the defendant say, "if Ricky or [James] . . . would kill Mr. David Dotson that all of this . . . would be over with." Regina said she was at the defendant's house when these conversations took place.

On cross-examination, Regina recalled that sometime in the summer of 2003 she overheard a conversation about burning school buses while she and Ricky were at the defendant's house. During that visit, the defendant received a phone call from someone trying to blackmail him to keep quiet about burning the bus. Regina said that the conversation she heard about shooting Mr. Dotson took place on another date when William and Pat Davis were also at the defendant's house, but Ricky was not present because he was in jail, having been arrested for burning the bus.

Paul Richard Junior Davis, "Ricky," testified that he burned a Franklin County school bus in the early morning hours of April 24, 2001, for which the defendant paid him $100. Ricky stated that the defendant gave him instructions on how to burn the bus and also provided him with two five-gallon containers of gasoline. Ricky recalled that the defendant "showed [him] what bus . . . he wanted to burn. And told [him] the bus wasn't running, that they was [sic] going to get insurance and he didn't want the [Dotsons] to get insurance because they'd have another bus on the route."

Ricky stated that Beverly Sisk did not participate in the vandalism but knew of the plan because she saw the defendant bring the gasoline. Ricky also stated that he did not pay his brother James to vandalize a bus. Ricky further asserted that he had never sold James marijuana.

Ricky recalled an occasion when he was with the defendant and James, and the defendant made a comment that "he wished the Dotsons was out of business that way . . . all this stuff would settle down and . . . he wouldn't have a big problem." Ricky stated that the defendant offered James money to vandalize the buses, but James "said he would do it freely because he didn't like the Dotsons either." Ricky recounted that James told him that he and Ricky Ervin had vandalized some buses behind E-Z Stop and perhaps also a bus behind Amoco. According to Ricky, James said that "daddy let 'em have a big old crow bar and they bashed in some radiators, and [James] said something about a brake line that he done and drained some gear oil out of the back of a bus." Ricky said that he had no reason to vandalize the buses other than because the defendant was paying for it and he needed money.

On cross-examination, Ricky stated that he, James, and Beverly Sisk were all using crack during the time leading up to the vandalism. Ricky said that even though he never had a close relationship with the defendant, he had been to his house a couple of times during that time period. Ricky recalled that he told Sisk he had set fire to the bus and gave her half the money. When confronted with his March 2004 statement to police in which he said Sisk had driven him to the bus when he set it on fire, Ricky insisted that she actually drove him to the bus with the gasoline cans the day before he set the bus on fire. He admitted that his current recollection differed from his March 2004 statement, but he explained that he could think more clearly now that he was off drugs. Ricky said that the defendant paid him the $100 at Ricky's trailer and that Sisk was present but did not see him get the money.

Sherry Dotson, transportation supervisor for Franklin County Schools, testified that there was a correlation between the defendant's former bus routes and the buses that were vandalized and burned. She explained as follows:

> We done away with three of those routes and we bidded out the few that was left. . . . [B]us 45, which was one of their routes became bus 29, which was one of their routes. We took the two routes and we put 'em together. That route was hit. That route was vandalized. Thirty seven that they owned, we consolidated that route, we put it with route 17, 17 was burned on AEDC Road.
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> We took 27, route 27, which was one of theirs[,] it became bus 5, bus 5 was hit twice. The brake lines was cut, the radiator was -- had holes punched in it and bus 20, bus 20 belonging to Larry Bradford was bidded out, and bus 20 was hit. The radiator was hit on that bus.
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> Also[,] Mr. Bradford also had a spare bus and it was hit as well.

Sherry estimated that Mae Davis lost about $13,000 a month due to the cancellation of her contract.

Mae Davis testified on the defendant's behalf. Mae explained that the reason the school children were left in Chattanooga was because the teacher and the students were not ready to leave when promised. Mae said that to her knowledge the defendant never discussed damaging school buses with Ricky or James. Mae also said that she and the defendant never discussed damaging buses. Mae stated that she had never met Beverly Sisk, and that Sisk had never been to her house. Mae testified that to her knowledge, the defendant never contacted Ricky and paid him "to do a job for him." Mae recalled that Regina Davis visited her house on about two occasions but never on an occasion when William and Pat Davis were there. Mae remembered that Regina was at her house on an occasion when William was there, but the defendant was in jail at that time. Mae stated that on the occasion when Regina and Ricky were at her house there was no discussion about burning a school bus. On cross-examination, Mae denied having a number of other bus-related complaints against her in addition to the Chattanooga incident.

The defendant testified that Edmonds, the Director of Schools, called and threatened to have him put in jail, to which he responded that he had not done anything. The defendant said that he did not want to have anything to do with his son Ricky after Ricky got out of prison and had never paid Ricky a penny. The defendant also said that he never asked Ricky to burn a bus for him. The defendant recalled visiting Ricky one time when Ricky lived with Sisk but said they just talked about "where he worked and stuff like that." When asked if he paid James to damage the radiators of school buses, the defendant replied that he never paid James a penny.

The defendant recalled that there were times Ricky wanted to borrow money, and he would give him $15 or $20 to buy cigarettes. The defendant stated that he refused to post bond for Ricky to get him out of jail. The defendant stated that he never had a conversation with Mae in Regina's presence about burning a school bus. The defendant testified that Regina had been to his house once or twice, but only to show him his grandchildren. The defendant denied taking gasoline and a crowbar to Ricky and Beverly's house and denied riding with Ricky to point out a school bus. On cross-examination, the defendant admitted that Regina had been inside his house before.

Following the conclusion of the proof, the jury convicted the defendant as charged. A sentencing hearing was conducted, during which the defendant testified that he was seventy-five years old, had coronary artery surgery about seven years ago, had a stroke within the last two years, and suffered from back problems. The trial court sentenced the defendant to three years on each of three Class D felony vandalism convictions; three years and six months on the other Class D felony vandalism conviction; eighteen months on one of the Class E felony vandalism convictions; 109 days on the other Class E felony vandalism conviction; three years and six months on the Class E felony arson of personal property conviction; and three years and six months on the Class D felony conspiracy to commit vandalism conviction. All the vandalism convictions were ordered to be served concurrently with each other, and the arson and conspiracy convictions to be served concurrently with each other. However, the effective vandalism sentence was ordered to run

consecutively to the arson and conspiracy sentences for a total effective sentence of seven years in the Department of Correction.

ANALYSIS

On appeal, the defendant challenges the sufficiency of the convicting evidence and the sentence imposed by the trial court.

Sufficiency

We begin our review by reiterating the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); *see* Tenn. R. App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In this state, even if the offense in question was not committed by the person's own conduct, the person may, nonetheless, be criminally responsible as a principal to the offense if "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense . . . ." Tenn. Code Ann. § 39-11-402(2). "Each party to an offense may be charged with commission of the offense." *Id.* § 39-11-401(b).

The defendant argues that there was insufficient evidence that he committed the vandalism as charged in the first five counts of the indictment. Specifically, he submits that there was no evidence he was criminally responsible for James's vandalism of the buses. In support of his argument, the defendant points out that at trial, James testified that the defendant had nothing to do with the vandalism. The defendant also notes that Ricky's testimony concerning James's admission of "bash[ing] in some radiators" was the testimony of an accomplice and was uncorroborated. The

state argues that Ricky was not an accomplice in the commission of the offenses in counts one through five.

In Tennessee, a conviction may not be based solely upon the uncorroborated testimony of an accomplice. *State v. Bane*, 57 S.W.3d 411, 419 (Tenn. 2001); *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001). "An accomplice is one who knowingly, voluntarily, and with common intent unites with the principal offender in the commission of a crime." *State v. Allen*, 976 S.W.2d 661, 666 (Tenn. Crim. App. 1997). "The test generally applied in determining whether a witness is an accomplice is whether the alleged accomplice could be indicted for the same offense charged against the defendant." *State v. Thomas*, 158 S.W.3d 361, 401 (Tenn. 2005); *Allen*, 976 S.W.2d at 666. Our supreme court has held that in order to properly corroborate accomplice testimony,

> [t]here must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's [testimony].

Shaw, 37 S.W.3d at 903 (quoting *State v. Bigbee*, 885 S.W.2d 797, 803 (Tenn. 1994)). Furthermore, independent evidence, though slight and entitled to little weight when standing alone, is sufficient to corroborate accomplice testimony. *State v. Heflin*, 15 S.W.3d 519, 524 (Tenn. Crim. App. 1999). However, evidence that merely casts suspicion on the accused is inadequate to corroborate an accomplice's testimony. *State v. Boxley*, 76 S.W.3d 381, 387 (Tenn. Crim. App. 2001) (citation omitted). The sufficiency of the corroboration is a determination for the jury. *Shaw*, 37 S.W.3d at 903.

At trial, Ricky testified that the defendant offered James money to vandalize the buses, but James "said he would do it freely because he didn't like the Dotsons either." Ricky recounted that James told him that he and Ricky Ervin had vandalized some buses behind E-Z Stop and Amoco. Ricky stated that James said that "daddy let 'em have a big old crow bar and they bashed in some radiators, and [James] said something about a brake line that he done and drained some gear oil out of the back of a bus."

It is our view that Ricky was an accomplice because he was originally indicted along with the defendant and James for the same vandalism offenses; and therefore, his testimony must be corroborated. *See, e.g.*, *State v. Terrance Yves Smothers*, No. M2005-00784-CCA-R3-CD, 2006 WL 304625, at *4 n.3 (Tenn. Crim. App., at Nashville, Feb. 9, 2006); *State v. Brian Eric McGowen, a.k.a. Brad Lee O'Ryan*, No. M2004-00109-CCA-R3-CD, 2005 WL 2008183, at *14 (Tenn. Crim.

App., at Nashville, Aug. 18, 2005), *perm. app. denied* (Tenn. Dec. 27, 2005).[3] As corroborative evidence of the defendant's involvement in the vandalism offenses, Beverly Sisk testified that she heard the defendant ask Ricky to vandalize some of the buses behind E-Z Stop and saw the defendant bring Ricky a long crow bar. The prosecutor asked Sisk if she heard the defendant mention radiators or how much a radiator was worth. Sisk responded, "Yes, . . . I think he said about 12 or $1500.00, and he told him that if he took a . . . crow bar or a tire tool and jabbed through 'em that it would . . . tear 'em up. . . . [T]hey would have to be fixed and that would cost them a lot of money." Sisk stated that she saw the defendant give Ricky some money although she did not know how much, but she recalled that one time Ricky had $100 after the defendant left. Regina Davis testified that, after the vandalism took place, she overheard Mae Davis and the defendant talking about destroying school buses. The bus owners each testified to the damage done to their buses – holes jabbed in the radiator, and all the vandalism offenses occurred within a short period of time and occurred soon after the defendant was fired. Sherry Dotson testified that all of the buses that were vandalized were buses that took over routes formerly handled by the defendant and his wife. David Dotson testified that every morning after a bus was discovered to have been damaged, the defendant "would come driving real slow right by." The direct and circumstantial evidence, viewed in the light most favorable to the state, was sufficient to corroborate Ricky's testimony and support the jury's finding that the defendant was criminally responsible for the vandalism offenses in counts one through five.

The defendant also argues that Ricky Davis's testimony was not sufficiently corroborated to convict him on counts six and seven, regarding the burned bus. We note initially that Ricky was clearly an accomplice to these offenses because he readily admitted he set fire to the bus. Therefore, Ricky's testimony that the defendant paid him $100 and instructed him on how to burn the bus and provided him with the gasoline must be corroborated.

As corroborative evidence, Beverly Sisk testified that she heard the defendant and Ricky talking about the defendant paying Ricky to burn the school bus and was present when the defendant gave Ricky two containers of gasoline. Regina Davis testified that, after the fact, she overheard the defendant talking to Mae Davis about having Ricky burn a bus for him. Sherry Dotson testified that the burned bus was a bus that was assigned to one of the defendant's and his wife's former routes. David Dotson, also a victim of damaged radiators, testified that the burned bus belonged to him. In the light most favorable to the state, we conclude that the direct and circumstantial evidence presented at trial was sufficient to connect the defendant to the burning of the school bus and support the defendant's convictions in counts six and seven.

Although neither party specifically addresses the sufficiency of the evidence in regard to the conspiracy conviction, to be thorough, we will briefly address the issue. At trial, James Davis

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[3] The pre-sentence report indicates that Ricky plead guilty to count one – vandalism over $1,000. If that is correct, then Ricky is considered an accomplice as a matter of law. *See State v. Allen*, 10 S.W.3d 286, 291 (Tenn. Crim. App. 1999) (stating that "once a witness pleads guilty to the same offense with which the defendant is charged . . . then the witness must be deemed an accomplice as a matter of law").

testified that Ricky Davis asked him to knock a hole in the radiator of a bus for $100 because Ricky and the defendant were in some kind of trouble. James admitted that he pled guilty to vandalism. Beverly Sisk testified that she was present during a conversation between the defendant and Ricky in which they were talking about vandalizing school buses. Sisk heard the defendant offer to pay Ricky to vandalize some school buses and saw him give Ricky some money. She also saw the defendant give Ricky a long crow bar and two containers of gasoline. Ricky testified that he had already pled guilty in this case and admitted to burning a school bus. Ricky said that he burned the bus because the defendant paid him $100 and gave him instructions and the gasoline for doing so. Although Ricky testified that he did not pay James to vandalize a bus, there was an occasion when he was with the defendant and James, and the defendant offered James money to vandalize buses. Ricky further testified that James later told him that he and a friend "bashed in some radiators" with a crowbar the defendant had given him. In the light most favorable to the state, the jury could have reasonably concluded that the defendant conspired with one or more persons to engage in the act of vandalism and that one or more parties committed an overt act in furtherance of the conspiracy. *See* Tenn. Code Ann. § 39-12-103.

As a related issue, the defendant briefly notes that the trial court did not give the jury an accomplice instruction, which would have informed the jury that it had to determine whether a witness was an accomplice to the offense, and if so, whether the accomplice's testimony was sufficiently corroborated. We note that the record does not indicate that the defendant requested an accomplice instruction at trial, nor did he raise the issue in his motion for new trial. Therefore, we conclude that the defendant has waived the issue and is not entitled to relief. *See* Tenn. R. App. P. 3(e); *State v. Anderson*, 985 S.W.2d 9, 17-18 (Tenn. Crim. App. 1997) (stating that in the absence of a special request, the trial court does not err by failing to instruct the jury about accomplice testimony even if the circumstances of the case warrant such an instruction); *see also State v. Bough*, 152 S.W.3d 453, 464-65 (Tenn. 2004).

Sentencing

The defendant challenges the length of his individual sentences, the imposition of consecutive sentences, and the denial of an alternative sentence – specifically probation. This court's review of a challenged sentence is a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Comments.

In conducting our de novo review, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing; (d) the

arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5),-210(b).

A. Length of Sentence

The defendant argues that there were neither significant mitigating nor enhancement factors; therefore, he should have received the minimum sentence in each range. The trial court sentenced the defendant as follows: count one, vandalism $1,000-$10,000, Class D felony, three years; count two, vandalism $1,000-$10,000, Class D felony, three years; count three, vandalism $500-$1,000, Class E felony, eighteen months; count four, vandalism $500-$1,000, Class E felony, one year and 109 days; count five, vandalism $1,000-$10,000, Class D felony, three years; count six, vandalism $1,000-$10,000, Class D felony, three years and six months; count seven, setting fire to personal property, Class E felony, three years and six months; and count eight, conspiracy to commit vandalism, Class D felony, three years and six months.

For class D and E felonies, the starting point for sentencing determinations is the minimum in the range. *See* Tenn. Code Ann. § 40-35-210(c) (1977).[4] Here, the defendant was a Range I offender; thus, for his Class D felony convictions, two years was the minimum sentence against which the trial court was to balance any mitigating and enhancement factors. *Id.* § 40-35-112(a)(4). For his Class E felony convictions, the minimum sentence was one year. *Id.* § 40-35-112(a)(5).

In sentencing the defendant, the trial court starts at the presumptive sentence, enhances the sentence within the range for existing enhancement factors, and then reduces the sentence within the range for existing mitigating factors. *Id.* § 40-35-210(e). The weight given to each factor is left to the discretion of the trial court as long as it comports with the sentencing principles and purposes of our code and as long as its findings are supported by the record. *See State v. Santiago*, 914 S.W.2d 116, 125 (Tenn. Crim. App. 1995).

The trial court determined that the defendant's past criminal record, a 1951 federal conviction for possession of moonshine and a 1952 federal conviction for transporting stolen property, should be used to enhance all of the defendant's sentences. *See* Tenn. Code Ann. § 40-35-114(1) (1977). The court also determined that it was implicit in the jury's finding that other people were involved in each of the offenses, which supported application of the factor that the defendant was a leader in the commission of an offense involving two or more criminal actors. *See id.* § 40-35-114(2). The trial court also enhanced counts three, six, and seven because "the amount of damage to property . . . was particularly great" in that the actual damage in those counts was more than the vandalism dollar range of which the defendant was convicted. *See id.* § 40-35-114(6).

We initially note that the trial court's application of enhancement factors (2) and (6) to enhance the defendant's sentences is problematic in light of *Blakely v. Washington*, 542 U.S. 296 (2004). In *Blakely*, the United States Supreme Court concluded that the " 'statutory maximum' for

[4] We utilize the statutes in place at the time of the offenses.

Apprendi [*v. New Jersey*, 530 U.S. 466 (2000),] purposes is the maximum sentence a court may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. *Blakely*, 542 U.S. at 303. Subsequently, in *State v. Gomez*, 163 S.W.3d 632, 661 (Tenn. 2005), a majority of our state supreme court concluded that, unlike the sentencing scheme in *Blakely*, "Tennessee's sentencing structure does not violate the Sixth Amendment." However, the United States Supreme Court recently vacated our supreme court's ruling in *Gomez* and remanded the case for reconsideration in light of its recent decision in *Cunningham v. California*, --- U.S. ----, 127 S. Ct. 856 (2007). Given the Supreme Court's pronouncement in *Cunningham*, we no longer feel compelled to follow *Gomez* and conclude that the trial court's application of enhancement factors (2) and (6) violated the dictates of *Blakely*. Nonetheless, application of enhancement factor (1), the defendant's criminal record, does not violate *Blakely* and was entitled to sufficient weight to justify the enhancement of the defendant's sentences. *See, e.g.*, *State v. Michael Burnette*, No. E2005-00002-CCA-R3-CD, 2006 WL 721306, at *8 (Tenn. Crim. App., at Knoxville, Mar. 22, 2006), *perm. app. denied* (Tenn. Sept. 5, 2006) (affirming enhancement of the defendant's sentence based on defendant's history of criminal convictions where defendant's prior record was one conviction for vandalism). The defendant is not entitled to relief on this issue.

However, we also note that the defendant's sentence in count seven for arson of personal property is clearly out of range for a Class E felony. An appropriate sentence would have been in the range of one to two years. *See* Tenn. Code Ann. § 40-35-112(a)(5). Accordingly, we modify the defendant's sentence in count seven to eighteen months, a sentence within the appropriate range and consistent with that imposed in the other counts.

B. Consecutive Sentences

When a defendant is convicted of more than one criminal offense, the trial court may order the sentences to run concurrently or consecutively as guided by Tennessee Code Annotated section 40-35-115. Pursuant to this code section, a trial court may order consecutive sentencing if any of the following criteria are found by a preponderance of the evidence:

> (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b). If the trial court finds that the defendant is a "dangerous offender," it must also determine whether the consecutive sentences are reasonably related to the severity of the offenses and serve to protect the public from further criminal conduct by the offender. *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995).

The trial court ordered that the sentences on counts one through six run concurrently with each other. The court also ordered that the sentences on counts seven and eight run concurrently with each other, but consecutively to the effective sentence for counts one through six. The trial court ordered consecutive sentences based on the defendant's record of criminal activity and, to a lesser extent, the "issue of possible injury to others" given that the damage to the buses might not have been discovered until after a wreck. *See* Tenn. Code Ann. § 40-35-115(b)(2) and (4).

We first note that the trial court did not make the requisite findings to support consecutive sentencing based on the defendant being a dangerous offender. *See id.* § 40-35-115(b)(4). However, the trial court also used the defendant's record of criminal activity to impose consecutive sentences. In doing so, the court looked at the defendant's criminal record and the eight offenses of which he was convicted in this case as contributing to a "record of criminal activity [which] is extensive" under Tennessee Code Annotated section 40-35-115(b)(2). The defendant was responsible for approximately $19,000 damage done to several school buses for no other reason than he was mad. In light of the multiplicity of the defendant's criminal behavior in this case along with his two prior convictions, we conclude the court acted within its discretion in imposing consecutive sentences. *See State v. Bobby Blair*, No. M2002-02376-CCA-R3-CD, 2003 WL 22888924, at *3 (Tenn. Crim. App., at Nashville, Dec. 5, 2003), perm. app. denied (Tenn. May 17, 2004) (noting that 40-35--115(b)(2) applies to both the extensive nature of the defendant's present convictions and the defendant's history of criminal activity); *see also Gray v. State*, 538 S.W.2d 391, 393 (Tenn. 1976); *State v. Cummings*, 868 S.W.2d 661, 667 (Tenn. Crim. App. 1992); *State v. Paul Neil Laurent*, No. M2005-00289-CCA-R3-CD, 2006 WL 468700, at *12-14 (Tenn. Crim. App., at Nashville, Feb. 27, 2006), *perm. app. denied* (Tenn. Aug. 21, 2006). The defendant is not entitled to relief on this issue.

C. Alternative Sentence

A defendant is presumed to be a favorable candidate for alternative sentencing if he is an especially mitigated or standard offender convicted of a Class C, D, or E felony and there exists no evidence to the contrary. Tenn. Code Ann. § 40-35-102(6). A defendant is eligible for probation

if the actual sentence imposed is eight years or less and the offense for which the defendant is sentenced is not specifically excluded by statute.[5] *See* Tenn. Code Ann. § 40-35-303(a). The trial court shall automatically consider probation as a sentencing alternative for eligible defendants; however, the defendant bears the burden of proving his or her suitability for full probation. *See id.* § 40-35-303(b). No criminal defendant is automatically entitled to probation as a matter of law. *See State v. Davis*, 940 S.W.2d 558, 559 (Tenn. 1997). Rather, the defendant must demonstrate that probation would serve the ends of justice and the best interests of both the public and the defendant. *See State v. Souder*, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002). Among the factors applicable to probation consideration are the nature and circumstances of the offense; the defendant's criminal record; his background and social history; his present condition, including physical and mental condition; and the deterrent effect on the defendant. *See State v. Kendrick*, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999).

In determining a defendant's suitability for a non-incarcerative sentencing alternative, the court should consider whether:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Id. § 40-35-103(1)(A)-(C). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. *Id.* § 40-35-103(5). Additionally, if the serious nature of the offense forms the basis for imposing a sentence of confinement, the "circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all factors favoring a sentence other than confinement." *State v. Grissom*, 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997) (internal quotations omitted).

In determining the manner of service of the defendant's sentence, the trial court stated as follows:

> [T]his was an egregious event, I don't think was something that was very slight, this was a very consequential event. Here you had a father encouraging sons to go out

[5] For crimes committed on or after June 7, 2005, sentences of ten years or less are eligible to be served on probation if not specifically excluded by statute.

> and commit a high dollar crime against a number of people, but primarily because he was mad at the fact, mad at them and mad at the world that his bus contracts had been pulled back so there was vengeance, there was corrupting of other people, his own children, you know, just all done out of vengeance it appears, . . . so that is not something that we can just say well I'll put him on probation and forget it. I don't care if his condition is poor he deserves some jail time in this case. . . .
>
> . . . .
>
> This was a very very serious offense, both the burning and also the criminal conspiracy[,] organizing one's sons to get involved, then suffer crimes [sic] themselves and they've already pled, so I think that this is [a] sentence that should be served and regrettable his age means he may be in jail the better part of this life . . . .

The court looked at the principles of sentencing set out in Tennessee Code Annotated section 40-35-103 and determined that confinement was necessary to avoid depreciating the seriousness of the offense.

Upon review, we conclude that the trial court properly acted within its discretion in ordering a sentence of confinement. The evidence showed that the defendant encouraged his sons to vandalize buses belonging to innocent people, simply because he was mad about losing his contract with the school system. In his vengeance, the defendant harassed innocent people and cost them collectively thousands of dollars. Moreover, recognizing that the buses were used for the transportation of school children, the defendant's actions in instigating damage to five different buses could have had a much more serious outcome. The court was aware of the defendant's poor physical health, but still determined that the circumstances of the case were such that confinement was necessary to avoid depreciating the seriousness of the offense. *See State v. Zeolia*, 928 S.W.2d 457, 462 (Tenn. Crim. App. 1996) (noting that the multiplicity of counts and the victims' financial losses are two factors directly relevant to the seriousness of the offense in determining whether confinement is appropriate in a given case). We conclude that there was sufficient evidence to rebut the presumption in favor of an alternative sentence, and the circumstances of the offenses justify sentences of confinement. The defendant is not entitled to relief on this issue.

CONCLUSION

Based on the foregoing, we affirm the defendant's convictions. We modify the defendant's sentence in count seven, arson of personal property, to a range-appropriate sentence of eighteen months and affirm the defendant's sentences in all other regards. The defendant's effective sentence of seven years remains unchanged.

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J.C. McLIN, JUDGE